89-1726

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION,
Petitioner,

v.

DEBORAH MCGLOTHIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether there was protected religious expression under the Free Exercise Clause of the First Amendment to the Constitution of the United States in the respondent school teacher's conduct for which she was discharged, prohibiting the denial of state unemployment benefits to her following the discharge;

2. Whether the boundaries of First Amendment protected religious expression for state unemployment insurance benefit purposes as delineated in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), *Thomas* v. *Review Board of Indiana Employment Security Commission*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), *Hobbie v. Unemployment Compensation Appeals Commission of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), and *Frazee v. Illinois Department of Employment Security*, 489 U.S. ——, 109 S. Ct. 1514, 103 L.Ed.2d 914 (1989), properly include the wearing of a head-wrap in the classroom whenever the teacher felt inclined to do so for any of a number of reasons, including expression of cultural identity, "during times of spiritual growth", for her health, and "dictated by (her) own personal preference";

3. Whether the state appellate courts exceeded the scope of their reviewing authority by in effect making a finding of fact that respondent's conduct was a sincerely held belief which was "rooted in religion" when there was no basis therefor in the Findings of Fact made by the Appeals Referee and adopted by the Board of Review. Section 71-5-531, Mississippi Code of 1972;

4. Whether it is necessary under the cases of *Sherbert*, *supra*, and progeny for a belief at issue in an unemployment benefit case to be "rooted in religion" in order to be First Amendment protected.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the Jackson Municipal Separate School District was a party to the administrative proceedings below and the subsequent appeal to the Circuit Court of the First Judicial District of Hinds County, Mississippi.

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MISSISSIPPI EMPLOYMENT SECURITY COMMISSION,
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DEBORAH MCGLOTHIN,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi (App. A., *infra*) is reported at 556 So.2d 324 (Miss. 1990). The Order of the Mississippi Supreme Court denying Petition for Rehearing (App.B., *infra*) is not reported. The corrected Opinion of the Circuit Court of the First Judicial District of Hinds County, Mississippi, (App.C., *infra*) is not reported. The decision of the Board of Review of the Mississippi Employment Security Commission (App.D., *infra*) is not reported. The decision of the Appeals Referee of the Board of Review (App.E., *infra*) is not reported.

JURISDICTION

The judgment of the Supreme Court of Mississippi (App.A., *infra*) was entered on January 10, 1990, and the Order denying the Petition for Rehearing (App.B.,

infra) was entered on February 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Amendment I to the Constitution of the United States of America: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances";

b) Amendment XIV, § 1 to the Constitution of the United States of America: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;"

c) Article 3, § 13, The Constitution of the State of Mississippi: "The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted";

d) Section 71-5-513A(1)(b), Mississippi Code of 1972: "An individual shall be disqualified for benefits: . . . for the week, or fraction thereof, which immediately follows the day on which he was discharged for misconduct connected with his work, if so found by the Com-

mission, and for each week thereafter until he has earned remuneration for personal services performed for an employer, as in this chapter defined, equal to not less than eight (8) times his weekly benefit amount, as determined in each case."

STATEMENT

This case was an appeal to the Mississippi Supreme Court by the Mississippi Employment Security Commission and from the corrected Order of the Circuit Court of the First Judicial District of Hinds County, Mississippi, reversing the decision of the Board of Review of the Mississippi Employment Security Commission. The federal question sought to be reviewed was first raised when Ms. McGlothin appealed the decision of the Appeals Referee to the Board of Review.

In her appeal to the Board of Review, the claimant used this language:

> To dismiss my claim to religious freedom, its importance is lessened by lumping it with a cultural practice. My statements about when I wear my wraps are taken out of context to justify a position that I am insubordinate since the practices are deemed whimsical. Our religious practices are not so easily dismissed or made unimportant, not to mention the fact that this dress code represents the unconstitutional bias of a particular principal who wants "her" teachers to look and act like she wants them to. The constitution prevents the regulation of my religious as well as cultural beliefs and practices, however simply someone may describe and low rate our rites, ceremonies and spiritually directed actions.

The Board's decision affirmed the decision of the Appeals Referee which rendered its decision disqualifying the claimant, Deborah McGlothin, from unemployment benefits under § 71-5-513A(1)(b), *ibid.*, based on the following Findings of Fact:

> Claimant was employed four years as an assistant teacher with the Jackson Public Schools, Jackson, Mississippi, ending March 17, 1987, when discharged for insurbordination. She was discharged because she continued to wear head-wraps after numerous discussions with the principal, advising that her attire was not considered appropriate professional dress for teachers and assistant teachers. The local shared governance committee, comprised of school personnel and parents had ruled that jeans and head-wraps were inappropriate dress. Claimant wears berets and head dresses as an expression of her religious and cultural heritage. The custom is not dictated by the Ethiopian Culture, but is claimant's preference in expressing her ancestry. Claimant admits she does not wear the head-wrap at all times, but is selective in choosing when to put it on. After prior warnings by the principal, claimant discontinued the practice. She resumed the practice after attending a multi-cultural workshop sponsored by the schools.

Those Findings find support in claimant's testimony as to her reasons for wearing the headdress. Thus, she testified: "I have practiced beliefs from the area of Ethiopia gearing toward the African Culture, and that within me, my spiritual self and my cultural expressions as a . . . The guidelines in this are a cultural African would wear headdress as a form of expression rather than using a chemical process of pressing the hair or drying the hair . . . Not all people of the culture would wear this . . . This would be one form that you would wear . . . It's more of a, just a preference, but at, at times when it really became an issue, I was searching for a spiritual growth. And in this spiritual growth because of my teachings of religion and my spiritual being, it became a part of me and is something that I felt that brought me closer to strength . . . whether (she) wear(s) a headdress or a beret that day is just dictated by (her) own personal preference." And, when asked further about the times she does and does not wear

the headdress, she responded that "there are times that I do not wear the head covering . . . it's not choosing not to express it (her religious and cultural belief). It's, it's for my health beliefs also . . .".

In its Corrected Opinion and Order, the Circuit Court Judge stated:

> Here, having found that claimant wears the head dress in question "as an expression of her religious and cultural heritage", the additional finding that the practice is not mandated and that plaintiff does not wear the head dress "all the time" detracts not at all from the conclusion that such practices are protected by the First Amendment to the United States Constitution and cannot be "misconduct" within the meaning of the statute, so as to deny unemployment benefits.

REASONS FOR GRANTING THE PETITION

The reasons relied on to support the issuance of the Writ of Certiorari in this case are that the proper boundaries set by this Court in the cases of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), *Thomas v. Review Board of Indiana Employment Security Commission*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), *Hobbie v. Unemployment Compensation Appeals Commission of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), and *Frazee v. Illinois Department of Employment Security*, 489 U.S. ——, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989), have been so far exceeded by the decision below of the Mississippi Supreme Court, as to call for a restatement by this Court of those boundaries. The decision appealed is in conflict with those decisions, and should be reversed. In the very recent case of *Employment Division, Department of Human Resources of Oregon, et al. v. Alfred L. Smith, et al.*, No. 88-1213, United States Supreme Court, April 17, 1990, this Court maintained those boundaries intact, recognizing the importance of the maximum decree of certitude

in such cases as this. The decision below, if allowed to stand, goes in the opposite direction.

The constitutionally protected right of religious expression is a right of the highest order. Within the context of entitlement to state unemployment benefits, its application and scope have been well defined by this Court. It is submitted that the unwarranted expansion of that right by the Mississippi Supreme Court has the effect of detracting from the proper dignity commanded by the right, and dilutes its authenticity by allowing it to encompass actions connected so tenuously to the bedrock belief which is at the heart of the protection of the First Amendment.

The Court recognized in *Frazee, supra*, that denominational affiliation is not a requirement, but if allowed to stand, the decision below takes a giant step into the wilderness, and it is earnestly submitted that there can be no map for guidance there.

CONCLUSION

The Petition for Writ of Certiorari to the Supreme Court of Mississippi should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

No. 07-59080

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION and JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT

v.

DEBORAH V. MCGLOTHIN

EN BANC

[Decided Jan. 10, 1990]

ROBERTSON, JUSTICE, FOR THE COURT:

I.

This case presents the question whether a public school teacher, dismissed for an on-the-job yet unobtrusive expression of her cultural and religious heritage on grounds not compelled by the demands of orderly school administration, may be denied benefits under the Mississippi Employment Security Act. The Mississippi Employment Security Commission (MESC) found the teacher's conduct "misconduct" within the Act and denied her claim. The Circuit Court reversed, holding on the facts found that the teacher's head-wrap was protected expression under the First Amendment. We affirm.

II.

A.

Deborah V. McGlothin was born on August 26, 1953. She lives in Jackson with her four children whom she

supports. McGlothin is a member of the original African Hebrew Israelities out of Ethiopia. As an expression of her religious and cultural heritage, McGlothin would at times wear a head-wrap, "especially during times of spiritual growth." In her words,

> It's more of a, just preference, but at, at times when it really became an issue, I was searching for a spiritual growth. And in this spiritual growth because of my teachings of religion and my spiritual being, it became a part of me and is something that I felt that brought me closer to strength.

McGlothin became employed by the Jackson Municipal Separate School District (JMSSD) on August 26, 1983. She was originally assigned to the McLeod Elementary School. She wore a head-wrap from time to time without incident. McGlothin requested a transfer to another school closer to her home, and beginning with the 1985-86 school year the JMSSD assigned her to the Whitfield Elementary School in west Jackson, where she served as an assistant teacher. During that first year Kisiah Nolan, school principal, expressed displeasure at McGlothin's head-wrap.

At the beginning of the 1986-87 school year, Principal Nolan convened the school's shared governance committee [1]

---

[1] George Terry, JMSSD's Director of Classified Personnel Services, offered more details on the shared governance committee:

> A. * * * a committee composed of employees and other persons of the school environment who establish procedures and rules and so on regarding the particular matters. In this case, according to the records, the shared governance committee had devised a dress code that was implemented at the school.
>
> Q. And when was this, did the committee meet and devise the dress code?
>
> A. I do not have the exact dates of that meeting. I understand that it was during this school term somewhere between August 28th and March 17th, and I do not know the exact date of that meeting nor when the dress code in itself was

which adopted a rule for classroom personnel prohibiting the wearing of headdresses or blue jeans.[2] Nolan then instructed McGlothin to cease wearing her head-wrap. Fearful of losing her job, McGlothin acquiesced for a time, as she has four children to support.

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established but my understanding was that it happened during this school term.

Q. It was just for this school only, or these . . .

A. This particular committee as a, what we call a local shared governance committee representing Whitfield Elementary School.

* * * *

A. The basic composition of a shared governance committee consists of administrators, in this case, . . . it would be the principal, certified personnel, usually represented by teachers, classified personnel usually represented by custodial, food service, instructional which consisted of teacher aides, teacher assistants, and clerical, which consisted of secretaries and also parents. . .

* * * *

A. Each school, each organization or entity has a local shared governance committee.

* * * *

A. The, the usual subject matter that's dealt with by shared governance committees comes from issues, concerns and problems that may be generated from any of the parties representing a school and that may usually have some bearing upon the operation of the school. I cannot say that this particular proceeding was designed to deal specifically with the McGlothin issue. I think perhaps that the, the topic may have come about as an appropriate topic for discussion, rather than as one to deal specifically with an individual, or an individual after that time.

Q. Okay, after they developed some guidelines, what were done with these guidelines?

A. The usual procedure for a shared governance committee is to submit to, I believe the superintendents, a record of its proceedings and also to disseminate that report to each individual on the staff, both certified and non certified, and also to inform the parent body, usually through PTA. That is the usual procedure for informing the school community of the actions of the shared governance committee.

[2] JMSSD has no district-wide employee dress code.

The Jackson Municipal Separate School District has a prominent district-wide educational policy of encouraging multi-cultural diversity and experience. In January of 1987 McGlothin attended a district-wide multi-cultural workshop where this feature of JMSSD's educational mission was emphasized. Her response is described in the record before MESC by District Personnel Director Terry.

> A. I have a statement from Ms. McGlothin that indicated that she attended a multi-cultural workshop that was presented by the Jackson Public School District, wherein the district and the board resolved that multi-cultural educations and the exercises that tend to suggest multi-cultural diversity were acceptable and supported by the school system. She indicated in her response that it was after attending that work shop that she resumed wearing the garments of discussion believing that it was the district's position to be more receptive to items of this nature, and that they were her way of expressing the cultural diversity that was not offensive.

February, 1987, was Black History month in JMSSD, as elsewhere. McGlothin testified

> We went right in to Black History Month and I was constantly called on during Black History Month to give my service because of my expertise and knowledge of the African culture, per se, which is being utilized here constantly, on a constant basis. And that I feel very hurt and offended that when the year comes around of Black History Month that I'm called upon to show my expression of Africanist and no one is objectionable to, you know, when I have it on. Ms. Nolan never verbally or any other way said anything other than praise to me of the programs that were presented and she did not mention that the wear was quite appropriate or inappropriate to have this head dress on at this time that I displayed these,

> these skits relating to the African culture that we speak of. I put on a skit of people who were in the struggle, who of course wore head wraps and I did not display their character myself. This was the way I'd dressed on those particular days as just a program director of the particular skits. And also I displayed the African folk lore and a number of things of that nature, and nothing was ever verbally said to me in objection or any way by Mrs. Nolan until I received in hand, while I was taking the kids to the restroom on that day I was given the memo. Nothing at all was said to me. I was constantly praised and I would hope that I would be judged on the merits of this.

On March 6, 1987, Principal Nolan delivered a written memorandum to McGlothin on March 6, 1987, concerning her "inappropriate dress." Nolan couched the issue in the need for teachers to dress professionally. "All children need positive role models, but especially do elementary-aged children because of their very impressionable young minds. I am concerned that your appearance is giving them a distorted view of what is appropriate." Nolan suggested that McGlothin "take some time [during spring break] to make a decision as to whether you desire to remain at Whitfield Elementary School."

McGlothin refused to discontinue wearing her head-wrap. On March 17, 1987, JMSSD discharged McGlothin for insubordination to her school principal.

Of importance, nothing in the record supports any inference that McGlothin's job performance as an assistant teacher was deficient. JMSSD's Terry reported "McGlothin's work was essentially satisfactory." Moreover, there is no evidence that McGlothin's actions in wearing her head-wrap had any adverse impact on her ability to do her job, nor upon the educational mission of Whitfield Elementary School.

B.

Following her discharge, McGlothin applied for benefits under the Mississippi Employment Security Act. On May 7, 1987, an MESC referee disqualified McGlothin for benefits on grounds of misconduct connected with her work, Miss.Code Ann. § 71-5-513A(1)(b) (Supp. 1989), and en route found the following facts:

> Claimant was employed four years as an assistant teacher with the Jackson Public Schools, Jackson, Mississippi, ending March 17, 1987, when discharged for insubordination. She was discharged because she continued to wear head-wraps after numerous discussions with her advising that her attire was not considered appropriate professional dress for teachers and assistant teachers. The local shared governance committee, comprised of school personnel and parents, had ruled that jeans and head-wraps were inappropiate dress. *Claimant wears berets and head dresses as an expression of her religious and cultural heritage.* The custom is not dictated by the Ethiopian Culture, but is claimant's preference in expressing her ancestry. Claimant admits she does not wear the head-wrap at all times, but is selective in choosing when to put it on. After prior warnings by the principal, claimant discontinued the practice. She resumed the practice after attending a multi-cultural workshop sponsored by the schools . . . by claimant's own admission, she is selective in wearing the traditional head-wrap which she continued to wear after being warned. . . .

[Emphasis supplied] The MESC Board of Review affirmed the referee. The Circuit Court of the First Judicial District of Hinds County reversed on the grounds that McGlothin's conduct was protected under the First Amendment free exercise clause. The Court stated:

> Here having found that the claimant wears the head dress in question "as an expression of her religion

and cultural heritage," the additional finding that the practice is not mandated and that plaintiff does not wear the head dress "all the time" detracts not at all from the conclusion that such practices are protected by the First Amendment to the United States Constitution and cannot be "misconduct" within the meaning of the statute, so as to deny unemployment benefits."

MESC now appeals to this Court.

III.

A.

Several general premises are *not* at issue and need be expressed. Those charged to administer our public schools have broad authority with which our law will brook but little interference. *See Merchant v. Pearl Municipal Separate School District*, 492 So.2d 959, 962 (Miss.1986); *Clinton Municipal Separate School District v. Byrd*, 477 So.2d 237, 240-42 (Miss. 1985); *Brantley v. Surles*, 404 So.2d 1013, 1018 (Miss.1981). More specifically, public schools have authority to promulgate and enforce a reasonable dress code for faculty, staff and students, provided only that its does not infringe rights otherwise protected and even then the schools may enforce such a code when undergirded by some compelling governmental interest reasonably related to their educational mission, so long as the least restrictive means reasonably available be employed.[3] For example, we have no doubt a school

[3] By way of illustration, *see Menora v. Illinois High School Athletic Ass'n*, 683 F.2d 1030 (7th Cir. 1982). At issue was the Association's rule proscribing players' wearing head gear in high school basketball games. The compelling interest was safety. Moshe Menora, a practicing Orthodox Jew and obviously a basketball player of no inconsiderable ability sought to wear his yarmulke. To an Orthodox Jew, not covering the male head is an affront to God. The Court recognized the legitimacy of the asserted safety interest but found the brush too broad. *Menora*, 683 F.2d at 1035-36. The matter was ultimately resolved by requiring Orthodox Jewish players to

could preclude a Native American Indian teacher from coming to work dressed as an Indian warrior, with full feathered head piece, clad in a loin cloth, war painted, carrying a tomahawk or a Christian teacher emulating Adam before the Fall—as an expression of his religious and cultural heritage.[4]

It is certainly true that insubordination may be grounds for discharge of a public school teacher. *Merchant v. Pearl Municipal Separate School District*, 492 So.2d 959, 963 (Miss. 1986); *Noxubee County Board of Education v. Givens*, 481 So.2d 816, 819 (Miss.1985); *Sims v. Holly Springs Municipal Separate School District*, 414 So.2d 431, 435 (Miss.1982). Insubordination is misconduct within the Mississippi Employment Security Act, ordinarily adequate that benefits be denied. *Shannon Engineering & Construction, Inc. v. Mississippi Employment Security Commission*, 549 So.2d 446 (Miss.1989).

McGlothin claims an exception to these general premises in the form of her right to free expression, religious or otherwise, secured by Miss. Const. Art. 3, § 13 (1890) and by the First Amendment to the Constitution of the United States, as made enforceable against the states through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 117 (1931); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

In *Claiborne County Board of Education v. Martin*, 500 So.2d 981 (Miss.1986), we recognized that

> public school employees are entitled to exercise rights protected by the First Amendment to the Constitution

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wear a securely fastened head covering, which both complied with religious law and obviated safety concerns. McConnell and Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. of Chi.L.Rev. 1, 43 (1989).

[4] *But cf. Rider v. Board of Education of Independent School District No. 1*, 414 U.S. 1097, 94 S.Ct. 733, 38 L.Ed.2d 556 (1973) (Douglas and Marshall, JJ., dissenting).

> of the United States and by Article 3, Section 13 of the Mississippi Constitution of 1890 without fear that their employment will be terminated or adversely affected. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414, 99 S.Ct. 693, 696, 58 L.Ed.2d 619, 623-24 (1979); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471, 481-82 (1977). School boards in this country have broad authority but none that they may not exercise within the limits of the Constitution. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628, 1637 (1943); *Clinton Municipal Separate School District v. Byrd*, 477 So.2d 237, 240 (Miss.1985).

Claiborne County, 500 S.2d at 985. These principles clothe teachers such as McGlothin in all protected forms of expression, religious as well as cultural. *See Arnold v. Carpenter*, 459 F.2d 939 (7th Cir.1972); *Martin v. Davison*, 322 F.Supp. 318 (W.D.Pa. 1971); *Dawson v. Hillsborough County School Board*, 322 F.Supp. 286 (M.D. Fla. 1971). In this state we take quite seriously the free exercise of religious beliefs. *In re Brown*, 478 So.2d 1033, 81036-39 (Miss.1985).

B.

Today's context is broader. The Employment Security Act affords a gratuitous benefit generally available to the involuntarily unemployed. The benefit is an entitlement available to all under objective criteria. A state may not deny the benefit on grounds the individual has refused to abandon sincerely held religious beliefs.[5] *Frazee v. Illinois Department of Employment Security*, 489 U.S. —, 109

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[5] We assume, without deciding, that there may be cases in which the school district's interest may be so compelling that it could of right discharge an employee where nevertheless the state would have no authority to withhold unemployment compensation benefits.

S.Ct. 1514, 103 L.Ed.2d 914 (1989); *Hobbie v. Unemployment Compensation Appeals Commission of Florida*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Board of Indiana Employment Security Commission*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). These cases proceed from the more general premise that one may not be forced to forsake religious expression or practice in order to secure a state benefit, unless the state has a compelling interest which overcomes the religious right and pursues this interest by the least restrictive means. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

What is a religious belief is often a difficult and delicate question. What is clear is that the question does

> not . . . turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas, 450 U.S. at 714, 67 L.Ed.2d at 631. This view draws meaning when we recall the truth Holmes saw is that "every opinion tends to become a law." *Lochner v. New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937, 949 (1905). Indeed, we have little need for an amendment protecting free religious exercise except it protects the individual from a state-imposed burden emanating from a general opinion that the individual's beliefs are unacceptable, illogical, inconsistent or incomprehensible.

We are aware of no unemployment benefits cases involving claimants who were discharged for wearing head pieces as a form of religious expression. *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478

(1986), however, is instructive. In *Goldman* an orthodox Jew challenged an Air Force regulation which prohibited members from wearing headgear while indoors. Officer Goldman's commanding officer instructed that he not wear his yarmulke while in uniform. The Supreme Court upheld the military regulation in a five to four decision, which may only be read as holding that the armed forces are the only arm of the government whose mission and interests are so compelling that this form of protected expression may be curtailed. Had Goldman been a teaching assistant at Whitfield Elementary School and had he been discharged by Principal Nolan and JMSSD, there can be no doubt that the *Goldman* Court would have held him entitled to unemployment compensation benefits.

IV.

In the end, this case turns on the facts as found by the administrative agency. MESC's core finding was that McGlothin wore head-wraps as a form of both religious and cultural expression. These findings are supported by substantial evidence and are well beyond our authority to disturb. Miss. Code Ann. § 71-5-531 (1972); *Melody Manor, Inc. v. McLeod*, 511 So.2d 1383, 1385 (Miss. 1987); *Mississippi Employment Security Commission v. Sellers*, 505 So.2d 281, 283 (Miss. 1987); *Piggly Wiggly of Bay Springs v. Mississippi Employment Security Commission*, 465 So.2d 1062, 1065 (Miss.1985).

There are further findings of fact before us and in these MESC finds three escapes from the law's mandate. First, we are told that there is no specific tenet of the African Hebrew Israelites mandating that women wear headdress. First Amendment protections, however, do not turn on whether the claimant's conduct or form of expression has been mandated by doctrine or teaching of a particular religious organization or denomination, nor is it necessarily of concern that members of the particular faith may disagree with claimant's interpretation of

church dogma. *Thomas v. Review Board of Indiana Employment Securi'y Commission*, 450 U.S. 707, 715-16, 101 S.Ct. 1425, 67 L.Ed.2d 624, 632 (1981). What—and all—that may be required are that the belief have a religious grounding and that the individual be expressing "sincerely held religious beliefs." *Frazee*, 103 L.Ed.2d at 920.[6]

Second, it is no defense that McGlothin may not be a regular participant in the organized activities of a particular church, synagogue or other religious body, although there is such a group in Jackson—the House of Israel Hebrew Cultural Center. McGlothin testified, however, "I don't meet with a group on a regular basis." *Frazee* recognized a right to unemployment benefits by one who refused to work on Sunday, notwithstanding that claimant was not a member of any church congregation and did not attend worship services on Sunday.

Third, it is of little or no relevance that McGlothin may have been "selective in wearing the traditional headwrap," that at times she did not wear it, else those who are backsliders would be without First Amendment protections. She must show only that she was sincere at the time, and this she has shown. Indeed, no one suggests McGlothin is less than sincere in her beliefs. That she would risk her job is tangible testament to McGlothin's sincerity.

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[6] *State v. Hershberger*, 444 N.W.2d 282, 286-87 (Minn. 1989) (Statute requiring display of slow-moving vehicle inapplicable to Amish defendants on grounds of violation of free exercise "although not all adherents regarded the display as violative of the Amish precepts.); *Dupon v. Employment Division*, 80 Or.App. 776, 723 P.2d 1073 (1986) (Unemployment benefits could not be denied to woman discharged after she missed work to attend religious convention important to her personal well-being on basis it was a sincere religiously motivated action.); *Key State Bank v. Adams*, 138 Mich.App. 607, 360 N.W.2d 909 (1984) (Although bank had legitimate business reason for employees to work on Saturday, state could not condition payment of unemployment benefits.).

MESC oral argument conceded sincerity,[7] arguing rather that McGlothin's beliefs, sincere though they may be, are not sufficiently religious in nature to enjoy First Amendment protection. The outer limits of the protections at issue were restated in *Frazee* that an asserted belief might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." 103 L.Ed.2d at 919-20, n.2 *citing Thomas v. Review Board*, 450 U.S. 707, 715, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). We regard it common knowledge that millions of women (and some men) around the world cover their heads as a matter of religious and cultural custom. *See* Rule 201, Miss.R.Ev. We dare say this is among the most widespread of all religious and cultural traditions, transcending race, geography and socio-economic status. It is well within the "outer limits". That the etiology of McGlothin's practice is not exclusively religious is similarly of no concern. Many religious practices have a cultural component, particularly in the eyes of non-practitioners.

In this case the school shared governance committee adopted the dress code, but no reason was given. The letter from Principal Nolan to McGlothin asserted that the head-wrap set a bad example for the children and would undermine McGlothin's ability to teach health and hygiene. Nothing in the record supports the charge. McGlothin wore her head wrap for two years at McLeod Elementary School and without incident. There is no evidence that any other school within JMSSD attempts

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[7] At oral argument MESC's counsel represented to the Court regarding McGlothin's beliefs:

> We believe they were sincere. They were something. They touched on the spiritual, if you will, but they were not . . . rooted in religion. . . .

Later counsel argued, "as sincere as this claimant was," her beliefs were outside *Sherbert*, *Thomas*, *Hobbie* and *Frazee*, for in those cases, according to counsel, the Justices "were thinking in loftier terms."

to prohibit such a practice. McGlothin testified that at least ten other employees at Whitfield wore head-wraps, but we are given no further details of their experience or their fate. Nothing before us in fact establishes that McGlothin's head-wrap had any adverse impact on the student, on McGlothin's job performance, or on the school's educational mission.

School policies and those who implement them often teach as lastingly as teachers in the classroom. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 631, 640-41, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) wisely observes: "That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Bethel School District v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986) reminds us that, among the fundamental values schools are supposed to teach, are "tolerance of divergent political and religious views."

Without further ado, we hold that the facts found by the MESC show that McGlothin's conduct was constitutionally protected religious and cultural expression. U.S. Const., Amdts. I and XIV; Miss. Const. Art. 3, § 13 (1890). As such, MESC had no authority to deny her claim for unemployment compensation benefits, this even though that conduct may have been misconduct had it not been constitutionally protected expression.

AFFIRMED.

HAWKINS, P.J., PRATHER, ANDERSON AND PITTMAN, JJ., CONCUR.

DAN M. LEE, P.J., DISSENTS BY SEPARATE WRITTEN OPINION, JOINED BY ROY NOBLE LEE, C.J. BLASS, J., DISSENTS BY SEPARATE WRITTEN OPINION, JOINED BY ROY NOBLE LEE, C.J.; DAN M. LEE, P.J.; AND SULLIVAN, J.

DAN M. LEE, PRESIDING JUSTICE, DISSENTING:

This case involves "the difficult duty of distinguishing between religious and secular convictions and . . . determining whether a professed belief is sincerely held." *Frazee v. Employment Security Dept.*, 489 U.S. ——, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989). At issue is our review of the denial of government benefits in the face of a claim of unconstitutional encroachment upon the free exercise of religious beliefs.

I.

McGlothin was discharged from her teaching position at a public elementary school because she wore headwraps in direct defiance of the rules and directives of the school officials. She claims that her conduct was constitutionally protected by the First Amendment and therefore, she is entitled to unemployment benefits.

A hearing to adjudicate McGlothin's claim was held before an MESC referee. In light of McGlothin's assertions, it was the referee's duty to ascertain that there was "ample predicate for invoking the Free Exercise Clause." *Frazee*, 103 L.Ed.2d 914, 919 (1989). The burden of proving that the conduct in question was entitled to constitutional protection rested with McGlothin. *See Claiborne County Board of Education v. Martin*, 500 So.2d 981 (Miss. 1986). To meet this burden it was incumbent on McGlothin to show that her actions were rooted in a sincere religious belief which motivated her conduct. *See Bowen v. Roy*, 476 U.S. 693, 703 (1986); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144 n.9 (1986); *Thomas v. Review Board of Indiana Employment Security Commission*, 450 U.S. 707, 715 (1981). An examination of the proof McGlothin offered to meet this burden is in order.

McGlothin testified at the hearing to the following: McGlothin does not belong to any organized religious body, however, she is a member of the original African Hebrew

Israelites of Ethiopia. She attends services, or meets with a group associated with the African Hebrew Israelites, sporadically. There is no mandate of the African Hebrew Israelites or the Ethiopian culture for women to cover their heads. She stopped wearing a headdress to class when the school governance committee implemented a dress code forbidding the wearing of bluejeans and headdresses. She attended a multi-cultural workshop in the month of January, 1987 and resumed wearing a headdress on occasion. February, 1987 was Black History Month at the school. At the request of the school officials she actively participated in the presentation of materials to the students which included the presentation of skits relating to the African culture. As program director of the skits, McGlothin would wear, without objection, a headdress on the days the skits were presented. Thereafter McGlothin continued to wear a headdress, but only when she felt like it, until her dismissal for insubordination statutorally defined as "misconduct." Her reasons for wearing a headdress were many: because it created a sense of well-being; it gave her a feeling of strength; it was a form of expression that she chose to exercise for health reasons; it helped give her some sense of identity; it was a personal preference. It was only when the wearing of the headdress became an issue that McGlothin expressed the conduct's relation to some religious ideas.

At the close of the hearing the MESC referee affirmed the decision of the Claims Examiner who had initially found McGlothin disqualified for benefits under § 71-5-513A(1)(b). The pertinent parts of the referee's decision is as follows:

> Based upon the record and testimony, the Referee finds as follows:
>
> *FINDINGS OF FACT*: Claimant was employed four years as an assistant teacher with the Jackson Public Schools, Jackson, Mississippi, ending March 17, 1987

when discharged for insubordination. She was discharged because she continued to wear head-wraps after numerous discussions with the principal, advising that her attire was not considered appropriate professional dress for teachers and assistant teachers. The local shared governance committee, comprised of school personnel and parents had ruled that jeans and head-wraps were inappropriate dress. Claimant wears berets and head dresses as an expression of her religious and cultural heritage. *The custom is not dictated by the Ethiopian Culture, but is claimant's preference in expressing her ancestry. Claimant admits she does not wear the head-wrap at all times, but is selective in choosing when to put it on.* After prior warnings by the principal, claimant discontinued the practice. She resumed the practice after attending a multi-cultural workshop sponsored by the schools.

OPINION: Section 71-5-513A(1)(b) of the Law provides than an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which she was discharged for misconduct connection with the work, if so found by the Commission, and for each week thereafter until she has earned remuneration for personal services equal to not less than eight (8) times her weekly benefit amount as determined in each case.

The term "misconduct" as used in the Mississippi Employment Security Law is usually defined as an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, as disregard of the standard of behavior which an employer has the right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

> In the opinion of the Referee, *by claimant's own admission*, she is selective in wearing the traditional head-wrap which she continued to wear after being warned that it was not considered professional attire. Claimant's discharge was for actions which constitute misconduct connection with the work as defined in the Law. The decision of the Claims Examiner is in order.
>
> *DECISION*: Affirmed.

The foregoing decision was adopted by the MESC Board of Review and reversed on appeal by the Circuit Court of the First Judicial District of Hinds County which made a finding that McGlothin's conduct was constitutionally protected. We are now asked to review that decision.

II.

When dealing with decisions of the MESC, the standard of judicial review is narrow: "[T]he findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, *shall be conclusive, and the jurisdiction of said court shall be confined to questions of law*" § 71-5-531 (emphasis added). This standard of judicial review is applicable to both the Circuit Court and this Court. *Melody Manor, Inc. v. McLeod*, 511 So.2d 1383 (Miss. 1987); *Mississippi Employment Security Commission v. Sellers*, 505 So.2d 281 (Miss. 1987); *Mississippi Unemployment Compensation Commission v. Avent*, 192 Miss. 85, 4 So.2d 296 (1941).

As the majority aptly points out, "McGlothin claims an exception" to § 71-5-513A(1)(b) "in the form of her right to free expression, religious or otherwise, secured by Miss. Const. Art. 3, § 13 (1890 and by the First Amendment to the Constitution of the United States." (majority at 9). The majority then eloquently, and correctly, expounds on the law as it relates to conflicts between government action and sincerely held religious beliefs. I submit, how-

ever, that the majority has missed the first step in the analysis and ignored our standard of review in reaching its decision. For these reasons, I must respectfully dissent.

III.

This case does not involve whether McGlothin's beliefs were religious in nature; it deals with the *sincerity* of those beliefs. Sincerity of belief is a question of fact left to the fact finder, not a question of law to be decided on review. As articulated by the United States Supreme Court in the case of *United States v. Seeger*, 380 U.S. 163 (1965):

> Local board and courts . . . are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.
>
> But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the *significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact*—a prime consideration to the validity of every claim for exemption. . . .

Id. at 184-85 (emphasis added). Accordingly, it was the duty of the MESC referee, as the fact finder, to initially determine whether McGlothin's claims were sincere.

IV.

In the case *sub judice* the MESC referee considered all the evidence presented and made a finding that McGlothin was not entitled to benefits, a finding that was upheld by the Commission. The opinion of the referee and commission do not use the magic words, "We find McGlothin's claim to be insincere," but that clearly was the ultimate

result. If anything, the opinion and findings of the referee and Commission are ambiguous on this point.

The majority pulls one sentence from the findings of the referee upon which to base its opinion. However, the entire majority opinion rests on the *assumption* that McGlothin's beliefs were sincere, when, in fact, no such finding was specifically made. While it is true that when there is a failure to make findings of fact, we will assume that those issues were resolved in favor of the Appellee, MESC, at the circuit court level, *Bryant v. Cameron*, 473 So.2d 174, 179 (Miss. 1985), I do not believe we are faced with a *failure* to make a finding in this case; rather, we are faced with *ambiguous* findings.

On review, we must look at the actions of the Commission and, if supported by evidence, we must affirm; we are not at liberty to view the case from the viewpoint of the Claimant. We are not the fact finders, nor are we free to substitute our opinion for that of the fact finder. *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss. 1983). Given the posture of the findings by the referee and Commission in this case, it is clear to me that the majority has ignored our scope of review and is substituting its opinion for that of the fact finder. In keeping with our scope of review, I would reverse the Circuit Court. For that reason, I must respectfully dissent.

ROY NOBLE LEE, C.J., JOINS THIS DISSENT.

BLASS, JUSTICE, DISSENTING:

I regret that I cannot subscribe to the Court's opinion. The First Amendment of the Constitution of the United States is being made here the subject of debate in the course of a dispute over whether a teacher's aide may wear a headwrap in the classroom when school regulations prohibit it, an issue which, in my judgment, has nothing whatever to do with appellant's free exercise of her religion.

As late as April 27, 1988, the Supreme Court of the United States said :

> There is no absolute "constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." *Sherbert v. Verner*, 374 U.S. 398, 409-410, 83 S.Ct. 1790, 1797, 10 L.Ed.2d 965 (1963). On three separate occasions we have held that an employee who is required to choose between fidelity to religious belief and cessation of work may not be denied unemployment compensation because he or she is faithful to the tenets of his or her church. As we explained in *Sherbert*:
>
> > Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against the appellant for her Saturday worship. *Id.* at 404, 83 S.Ct. at 1794.

Emp'oyment Division, et al. v. Smith, 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753.

This language describes an earnest and genuine conflict between law and religion, indicating the gravity of the situation to which the constitutional guaranty is addressed. In my opinion, the employee here has not been required to choose between fidelity to her religious belief and cessation of work. Indeed, according to the record

and the findings by which we are bound, she makes no such claim. She says, in effect, that when she chooses to wear the prohibited headdress she does so as an expression of her heritage, religious and cultural. She does not even claim that the wearing of the headdress was a religious act. When the school authorities, by regulation, determined that headwraps not be worn in the school, the reasonableness of which regulation is not challenged, this teacher's aide chose to defy the authorities and she was fired. I find no such confrontation as is described in *Smith*. One need only read the First Amendment. Any relation between the language there and the facts here is purely imaginary. Here there is no burden placed upon appellant's fidelity to her religious belief or the free exercise of her religion.

There is nothing demeaning about requiring that citizens respect regulations imposed by duly and legally constituted authority. We have a choice between this and anarchy. An examination of our docket clearly shows that we have gone far enough in this direction.

I respectfully dissent.

ROY NOBLE LEE, C.J., DAN M. LEE, P.J., and SULLIVAN, J., JOIN THIS OPINION.

[SEAL]

MANDATE
From The
SUPREME COURT OF MISSISSIPPI

To the Hinds County Circuit Court,
First Judicial District—GREETINGS:

On 10th Day of January, 1990, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case # 07-CA-59080

Trial Court Case # 35145

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION and
JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT

vs.

DEBORAH V. MCGLOTHIN

Affirmed. Appellants are taxed with all costs of this appeal. Robertson, J., Hawkins, P.J., Prather, Anderson, and Pittman, JJ., Concur. Dan Lee, P.J., Dissents by Separate Written Opinion Joined by Roy Noble Lee, C.J. Blass, J., Dissents by Separate Written Opinion Joined by Roy Noble Lee, C.J., Dan Lee, P.J., and Sullivan, J.

WEDNESDAY, FEBRUARY 14, 1990:

Petition for Rehearing Denied. Roy Noble Lee, C.J., Dan Lee, P.J., Sullivan, and Blass, JJ., Dissent.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Roy Noble Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on February 26, 1990, A.D.

/s/ Linda Stone
Supreme Court Clerk

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

No. 35,145

DEBORAH V. MCGLOTHIN,
Plaintiff

vs.

JACKSON PUBLIC SCHOOLS and
MISSISSIPPI EMPLOYMENT SECURITY COMMISSION,
Defendants

CORRECTED OPINION AND ORDER

This matter is before the court on appeal from a decision of the Mississippi Employment Security Commission, Board of Review, denying benefits to appellant Deborah McGlothin. McGlothin claims that the denial of benefits violates her rights under the First Amendment to the United States Constitution in that she was terminated for conduct which she believed expressive of her religious and cultural heritage.

McGlothin, a teacher assistant with appellee Jackson Public Schools, was discharged when she refused to discontinue a style of dress that included head wraps and barrettes and which her principal found objectionable and in violation of the dress code adopted for that school. McGlothin claims the style is an expression of her Ethiopian and African culture and belief. She testified that

> [i]ts more of a, just a preference, but at, at times when it really became an issue, I was searching for a spiritual growth. And this spiritual growth because of my teachings of religion and my spiritual being, it became a part of me and is something that I felt that brought me closer to strength.

She testified that she was wearing the head dress "more often on a daily basis" but that her personal preference dictated whether she would wear it on a particular day. She testified that she had discontinued wearing the head dress for a period of time after an issue was made of it by the principal, but that she was hoping that she could meet with an assistant superintendent about the issue. She never met with a higher authority, but following an in service training session in which multi-cultural expression was discussed she resumed wearing the head dress in hope that the principal's preference would be overridden by a system-wide policy.

McGlothin testified that she was in "the religion of the original African Hebrew Israelites out of Ethiopia" but that she attended no regular group meetings. She testified that she met on a yearly basis, finances permitting, with a group with similar beliefs in Washington, D.C.

The Board of Review made the following findings;

> Claimant wears berets [1] and headdresses as an expression of her religious and cultural heritage. The custom is not dictated by the Ethiopian Culture, but is claimant's preference in expressing her ancestry. Claimant admits she does not wear the head-wrap at all time, but is selective in choosing when to put it on.

These findings are clearly supported by the evidence. The last sentence requires some elaboration in that McGlothin testified that for health reasons she would some times not wear the head dress to allow her "pores and areas in the hair to get the nourishment that they need." It is fair to say that McGlothin expressed no religious dictate that she wear the head dress in question at all times.

---

[1] This accurately quotes the finding. The record contains references to "barrettes" and "berets". Barrettes is used in plaintiff's brief. The court is unable to determine which is appropriate.

Accepting the findings, however, the question is whether the Board of Review reached the right legal conclusion. McGlothin suggests that it did not, citing *Hobbie v. Unemployment Appeals Commission of Florida*, —— US ——, 107 S. Ct. 1046 (1987); *Thomas v. Review Board of Indiana Employment Security Division*, 450 US 707, 101 S. Ct. 1425, 67 L Ed 2d 624 (1988); and *Sherbert v. Varner*, 374 US 398, 83 S. Ct. 1790, 10 L Ed 2d 965 (1963).

In response, MESC fastens on the opening sentence in the substantive portion of the opinion in *Thomas* and urges that only those practices which are prescribed and mandated by ones religious belief warrant protection in the manner urged by the plaintiff here. MESC ignores, however, the rest of the opening paragraph.

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas, supra, 450 U.S. at 714, 101 S. Ct. at 1430.

In *Thomas* the review board found that Thomas quit his employment due to his religious conviction against working on tank turrets for military tanks. The Indiana Supreme Court reviewed the record and opined that "although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was" and that Thomas had made a merely "personal and philosophical choice rather than a religious choice." The Indiana court also found significant the fact that another adherent to the same faith as Thomas had no problem working on tank turrets.

But the Supreme Court held that

> [c]ourts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

450 US at 715

Here, having found that claimant wears the head dress in question "as an expression of her religion and cultural heritage," the additional finding that the practice is not mandated and that plaintiff does not wear the head dress "all the time" detracts not at all from the conclusion that such practices are protected by the First Amendment to the United States Constitution and cannot be "misconduct" within the meaning of the statute, so as to deny unemployment benefits.

Finally, this court notes that this record presents issues of freedom of expression and substantive due process apart from religious freedom, in view of the fact that this is a government employer and in view of the fact that there was absolutely no showing that McGlothin's dress is anyway affected her performance or caused a disruption. Moreover, her dress did not violate any system-wide written dress code. See, *Conard v. Goolsby*, 350 F. Supp. 713 (ND Miss. 1972); *Ramsey v. Hopkins*, 320 F. Supp. 477 (DC Ala. 1970) Remanded on other grounds, 477 F 2d 128 (5th Cir.); *Finot v. Pasadena City Board of Education*, 250 Cal App 2d 189, 58 Cal Rptr. 520 (1967); and, *contra*, *Morrison v. Hamilton County Board of Education* (Tenn. 1973). The court does not reach these issues, however, because they were not specifically raised.

Based on the foregoing, the decision of the Board of Review is REVERSED.

Ordered this the 31st day of March, 1988.

/s/ Fred L. Banks, Jr.
Circuit Judge

MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION
BOARD OF REVIEW

HEARING BEFORE REFEREE

-D-

CC: 380

4445-R-87
MC 255.1

In the matter of the claim of:

McGLOTHIN, DEBORAH V.
SS# 587-66-0590
2324 St. Charles St.
Jackson, MS 39209

An initial claim for benefits under the Mississippi Employment Security Law was filed by the above-named individual, hereinafter called claimant, on March 25, 1987, effective March 22, 1987. On April 6, 1987, the Claims Examiner disqualified claimant for benefits under Section 71-5-513A(1)(b) of the Law on the ground claimant was discharged for misconduct connected with the work. Claimant filed Notice of Appeal from that determination on April 13, 1987. A hearing before the Referee was held May 7, 1987, at which claimant with legal counsel and an employer representative appeared and testified. The attorney fee was set at $69.60 which is eighty percent of claimant's weekly benefit amount of $87.00.

Based upon the record and testimony, the Referee finds as follows:

FINDINGS OF FACT: Claimant was employed four years as an assistant teacher with the Jackson Public Schools, Jackson, Mississippi, ending March 17, 1987, when discharged for insubordination. She was discharged because she continued to wear head-wraps after numerous

discussions with the principal, advising that her attire was not considered appropriate professional dress for teachers and assistant teachers. The local shared governance committee, comprised of school personnel and parents had ruled that jeans and head-wraps were inappropriate dress. Claimant wears berets and head dresses as an expression of her religious and cultural heritage. The custom is not dictated by the Ethiopian Culture, but is claimant's preference in expressing her ancestry. Claimant admits she does not wear her head-wrap at all times, but is selective in choosing when to put it on. After prior warnings by the principal, claimant discontinued the practice. She resumed the practice after attending a multicultural workshop sponsored by the schools.

OPINION: Section 71-5-513A(1)(b) of the Law provides than an individual shall be disqualified for benefits for the week or fraction thereof which immediately follows the day on which she was discharged for misconduct connected with the work, if so found by the Commission, and for each week thereafter until she has earned remuneration for personal services equal to not less than eight (8) times her weekly benefit amount as determined in each case.

The term "misconduct" as used in the Mississippi Employment Security Law is usually defined as an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, as disregard of the standard of behavior which an employer has the right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

In the opinion of the Referee, by claimant's own admission, she is selective in wearing the traditional head-wrap which she continued to wear after being warned that it was not considered professional attire. Claimant's discharge was for actions which constitute misconduct con-

nected with the work as defined in the Law. The decision of the Claims Examiner is in order.

DECISION: Affirmed. Claimant is disqualified from March 18, 1987, and continuing thereafter until she has earned remuneration for personal services in an amount equal to eight (8) times the weekly benefit amount or $696.00 through covered employment.

Dated at Jackson, Mississippi, this the 11th day of May, 1987.

/s/ Pansy B. Taylor
PANSY B. TAYLOR
Appeals Referee

MISSISSIPPI EMPLOYMENT SECURITY
COMMISSION
BOARD OF REVIEW
HEARING BEFORE BOARD OF REVIEW

-T-

1869-BR-87
MC-255.1
re: 4445-R-87

In the matter of the claim of:

McGLOTHIN, DEBORAH V.
SSN 587 66 0590

This cause came on for review and decision by the Board of Review at its regular session in Jackson, Mississippi, on July 2, 1987.

The Board of Review, after careful review and consideration of all the evidence, adopts the Findings of Fact and Opinion of the Referee and hereby affirms that decision.

Dated at Jackson, Mississippi, this the 2nd day of July, 1987.

BOARD OF REVIEW

/s/ Walter R. Bivins
WALTER R. BIVINS
Chairman

/s/ Rank Boyte
RANK BOYTE
Member

/s/ Alcus Smith
ALCUS SMITH
Member

This decision will become final ten (10) days after the date entered below. You may petition the Circuit Court for a review of this decision within ten (10) days after it becomes final (that is, within (20) days after the date entered below).

IMPORTANT NOTICE TO CLAIMANT: Should a petition to the Circuit Court be filed, you should continue to file your claims weekly pending receipt of the Court's decision for the reason that should the Court's decision be favorable to you, benefits will be paid only for those weeks actually claimed.

If you have questions regarding this decision, you may consult a representative of the Employment Security Commission at the place you file your claims or at the nearest Claims Center Office of the Mississippi Employment Security Commission.

Date Mailed: July 7, 1987

DEBORAH V. MCGLOTHIN
2324 St. Charles St.
Jackson, MS 39209

HON. CYNTHIA STEWART
499 So. President St.
Jackson, MS 39201

Jackson Public Schools
P.O. Box 2338
Jackson, MS 39205

ORIGINAL

Supreme Court, U.S.
FILED
JUL 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1726

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
JUL 25 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION
Petitioner

vs

DEBORAH MCGLOTHIN
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI

Cynthia Ann Stewart
Counsel of Record
P. O. Box 22909
Jackson, Mississippi 39225-2909
(601) 948-7777

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NO. 89-1726

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION PETITIONER

VS.

DEBORAH MCGLOTHIN RESPONDENT

REPLY TO PETITION FOR WRIT OF CERTIORARI

The decision of the Mississippi Supreme Court falls squarely within the principles set forth in Frazee v. Illinois Department of Employment Security, 489 U.S. ___, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989); Hobbie v. Unemployment Compensation Commission of Florida, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); Thomas v. Review Board of Indiana Employment Security Commission, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); and Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Petitioner would compel this Court to establish religion by excluding from that term the religious customs of individuals whose practices differ significantly from those of the majority of citizens. This is anathema to the First Amendment. This Court specifically addressed this point in noting that the determination of what is religious does

> not .... turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection.

Thomas v. Review Board of Indiana Employment Security Commission, 450 U.S. at 714, 67 L.Ed.2d at 631.

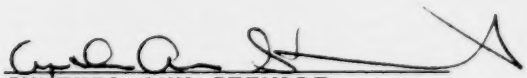
Employment Div., Dept., of Human Resources v. Smith, ___ U.S.

___, 110 S.Ct. 1595 (1990) recently reiterated the principles applicable to this case. In permitting the denial of unemployment benefits for employment termination due to illegal use of peyote, for religious reasons, the Court refused to adopt a holding necessitating constant judicial determination of what is "religious." The Court reaffirmed that "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particualr litigants' interpretation of those creeds." Hernandez v. Commissioner, 490 U.S. ___, ___, 109 S.Ct. ___, ___ (1990)." Petitioner would, here, have the Court so judge the sincerity of Respondent's religious practices and beliefs.

The Mississippi Employment Security Commission, the Circuit Court of the First Judicial District of Hinds County, Mississippi, and the Supreme Court of Mississippi consistently held and upheld the wearing of headdress by Deborah McGlothin to be an expression and practice of her religious beliefs. As such, it is entitled to the highest protection under the First Amendment. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

DEBORAH MCGLOTHIN

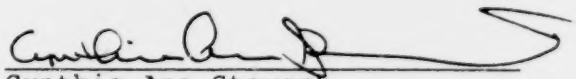
BY: 

CYNTHIA ANN STEWART
Attorney for Respondent
P. O. Box 22909
Jackson, Mississippi 39225-2909
(601) 948-7777

ACKNOWLEDGEMENT OF SERVICE

I hereby acknowledge that I mailed, by U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing Reply to the Petition for Writ of Certiorari to Hon. Fred Lotterhos, P.). Box 1699, Jackson, Mississippi 39215-1699 and the Jackson Public Schools, P.O. Box 2338, Jackson, Mississippi 39205.

This the 24th day of July, 1990.



Cynthia Ann Stewart

Supreme Court of the United States

No. 89-1726

Mississippi Employment Security Commission,

Petitioner

v.

Deborah McClothin

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Mississippi, No. 07-59080.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Mississippi.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 1, 1990

A true copy JOSEPH F. SPANIOL, JR.
Test:
Clerk of the Supreme Court of the United States
By _____ Deputy

RECEIVED
JUN 22 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 89-1726

vs.

Miss. Employment Security Commission (Petitioner) Deborah McGlothin (Respondent)

The Clerk will enter my appearance as Counsel of Record for Deborah McGlothin

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature _____

(Type or print) Name Cynthia Ann Stewart Not member

☐ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Royals Hartung & Davis

Address P. O. Box 22909

City & State Jackson, Mississippi Zip 39225-2909

Phone (601) 948-7777

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

89-1726

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

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No. ——

MISSISSIPPI EMPLOYMENT SECURITY COMMISSION,
Petitioner,

v.

DEBORAH MCGLOTHIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

CERTIFICATE OF SERVICE

I hereby certify that the above captioned Petition for a Writ of Certiorari to the Supreme Court of Mississippi was mailed this 8th day of May, 1990 by first-class mail, postage prepaid, to the following counsel:

Honorable Cynthia Stewart
Attorney at Law
c/o MS Capitol Defense Resource Center
P.O. Box 510
Jackson, MS 39205

James E Lyons
James E. Lyons

Washington, D. C.
Subscribed and sworn to before me
this 8th day of MAY, 1990
Notary Public D. C.

My Commission Expires October 31, 1994